

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1336

To be argued by
PETER D. SUDLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1336

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GAMBINO and CARLO CONTI,
Defendants-Appellants.

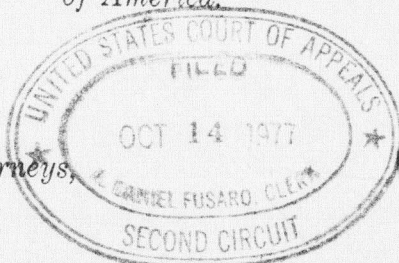
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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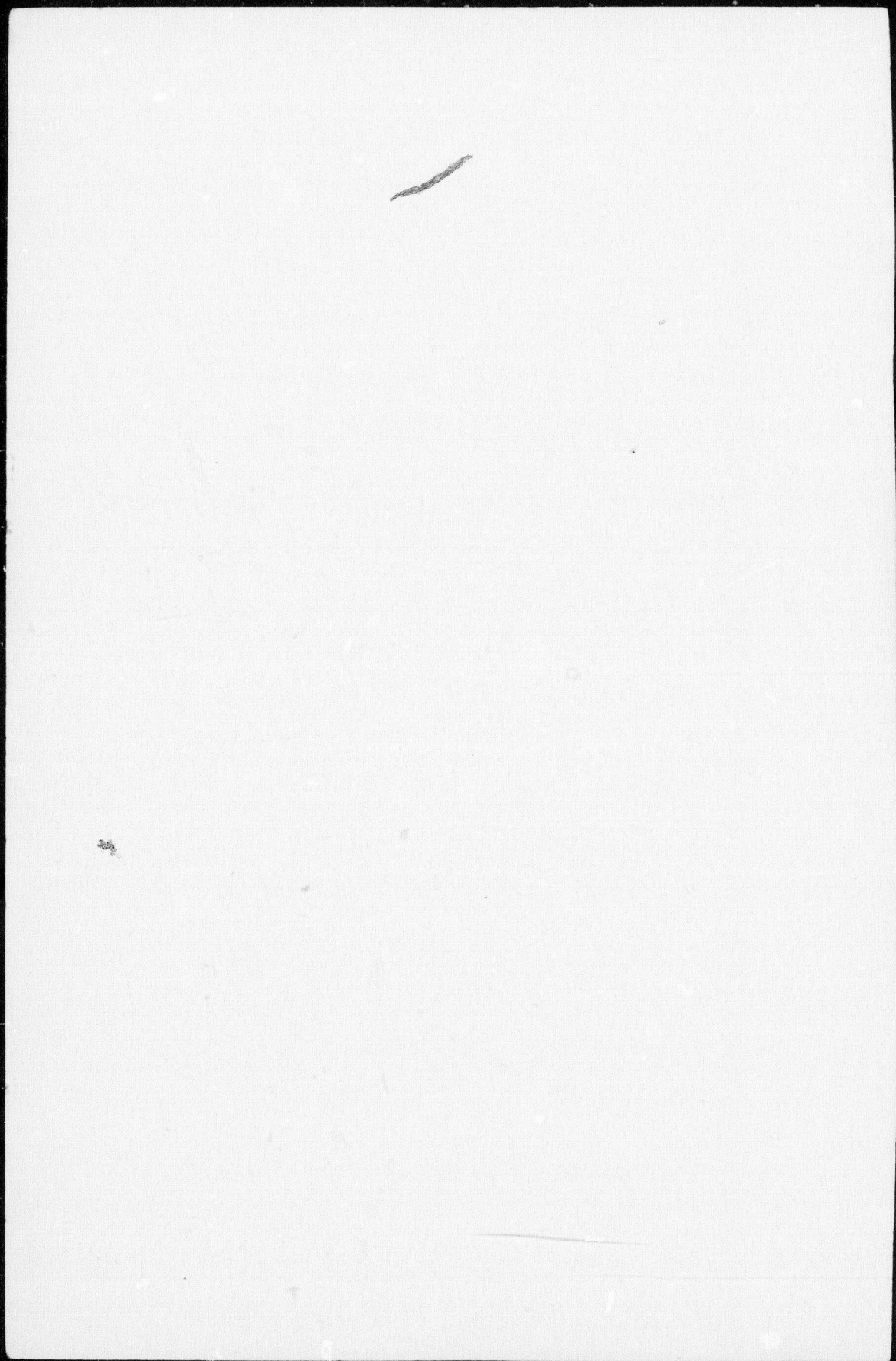


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JOSEPH GAMBINO and CARLO CONTI,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Gambino and Carlo Conti appeal from judgments of conviction entered on July 21, 1977, in the United States District Court for the Southern District of New York, after a four week trial before the Honorable Robert J. Ward, United States District Judge, sitting without a jury.

Indictment S77 Cr. 164 in twenty-two counts was filed on May 3, 1977.* Count One charged Gambino and Conti with conspiring to acquire and to maintain control of the private sanitation industry in the Co-op City area and other areas of the Bronx, New York through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 371. Count Two charged that Gam-

* This indictment superseded Indictment 77 Cr. 164, filed on March 1, 1977.

bino and Conti acquired and maintained an interest in Terminal Sanitation, a Bronx private sanitation company, through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 1962(b). Count Three charged that Gambino and Conti obstructed commerce by obtaining monthly cash payments from Terminal Sanitation and its principals, Peter and Anthony Darminio, by means of extortion, in violation of Title 18, United States Code, Section 1951. Count Four charged that Gambino and Conti used threats and violence in order to collect an extension of credit from Peter Darminio, in violation of Title 18, United States Code, Section 894. Count Five charged that Gambino and Conti attempted to obstruct commerce by assaulting and threatening to kill persons associated with American Automated, Inc., a Government-financed private sanitation firm, in order to force them to cease doing garbage collection business in Co-op City, in violation of Title 18, United States Code, Section 1951. Counts Six through Eleven charged Gambino with evading his federal income taxes for the years 1970 through 1975, in violation of Title 26, United States Code, Section 7201. Counts Twelve through Sixteen charged Gambino with falsely subscribing his federal income tax returns for the years 1970, 1972, 1973, 1974 and 1975, in violation of Title 26, United States Code, Section 7206(1). Counts Seventeen through Twenty-Two charged Conti with aiding and abetting Gambino in the attempt to evade his federal income taxes in violation of Title 18, United States Code, Section 2.

Trial commenced on May 16, 1977. On June 16, 1977 the Court convicted Gambino on Counts One, Two, Three, Four, Six, Seven, Eight, Nine and Eleven, acquitted him of Counts Five, Ten, and Fifteen, and found it unnecessary to return a verdict on Counts Twelve, Thirteen, Fourteen and Sixteen, which were lesser included tax offenses. Conti was convicted on Counts One, Two, Three,

Four and Five. Counts Eighteen through Twenty-Two were dismissed for lack of evidence at the end of the Government's case.

On July 21, 1977 Judge Ward sentenced Gambino to concurrent terms of imprisonment of five years on Count One and ten years each on Counts Two, Three and Four. Consecutive fines of \$10,000 each were imposed on Gambino on Counts Six, Seven, Eight, Nine and Eleven for a total of \$50,000. Gambino was placed on concurrent terms of three years probation on each of Counts Six, Seven, Eight, Nine and Eleven, however, the terms of probation are to end upon his deportation. Conti was sentenced to concurrent terms of imprisonment of five years on Count One and eight years on each of Counts Two, Three, Four and Five.

Both defendants are at liberty pending appeal.

The Government's Case

A. Synopsis

By means of a pattern of racketeering activity, which included extortion, violence and loansharking, the defendants Joseph Gambino and Carlo Conti controlled virtually the entire private sanitation industry in Co-op City and other areas of the Bronx, New York during the years 1970 through 1976. The proof showed that the racketeering activity began when Gambino and Conti found themselves unable to procure a carting license from the Trade Waste Division of the New York City Department of Consumer Affairs. They thereupon arranged for Terminal Sanitation, a licensed private sanitation firm owned by Peter and Anthony Darminio, to collect all of the commercial refuse "stops" * which Gambino had previ-

* In the private sanitation industry a customer for garbage collection is referred to as a "stop." (Tr. 3022).

ously acquired in the Co-op City area and other areas of the Bronx. The Darminio brothers were required to kickback to Gambino one-third of all monies received from servicing these "stops." Gambino and Conti maintained control of garbage collection in Co-op City and other areas of the Bronx by violent threats to kill their competitors and by administering beatings to other cartmen who solicited "stops" in competition with the defendants. One incident illustrative of defendants' practice was the beating by Conti of an undercover Special Agent of the FBI who, posing as a cartman, had solicited a stop in Co-op City.

In the course of these activities, Gambino engaged in extensive loansharking activities, lending a total of \$90,000 to Peter Darminio in 1970-71 and \$75,000 to him in 1972. These loans were collected from Darminio by Gambino and Conti through the use of threats and violence. Income, both from undisclosed ownership of the private carting route in Co-op City and from interest on usurious loans, was omitted from Gambino's tax returns filed for the years 1970 through 1975.

B. Gambino and Conti Become Partners.

Joseph Gambino entered the United States illegally in 1958 and was employed at various jobs including waste removal operations at the Mount Vernon incinerator until 1968. In 1968, Gambino and his co-defendant Carlo Conti purchased garbage removal equipment from their employer, James Plastina, and formed Columbus Lease Corp. with Gambino as President and 2/3 stockholder and Conti as Secretary-Treasurer and 1/3 stockholder. As Columbus Lease, Corp., Gambino and Conti continued Plastina's waste removal operation at the Mount Vernon incinerator under an agreement with the

City of Mount Vernon until the contract terminated on November 24, 1969. (Tr. 1270-71, 3021).*

During 1969 and 1970 Gambino and Conti attempted to obtain a private carting license from the Trade Waste Division of the New York City Department of Consumer Affairs in the name of Yellow Bird Carting, Inc. (hereinafter "Yellow Bird").** Yellow Bird was a private sanitation firm owned by Joseph Gambino, but operated by its listed President Carlo Conti. Even though it was unlicensed, Yellow Bird serviced commercial garbage collection in 1969 and 1970 in the then new Co-op City ***

* "Tr." refers to the trial transcript; "GX" refers to Government's Exhibits; "DCX" refers to Defendant Conti's Exhibits; "DGX" refers to Defendant Gambino's Exhibits; "Br." refers to Appellants' Joint Brief; "App." refers to the Appellants' Joint Appendix.

** In order to qualify for a carting license in New York City, the applicant must show a minimum dollar amount of garbage collection business. Yellow Bird met this requirement by contracting with Peter Darminio, a partner in Terminal Sanitation, for the sale of numerous Terminal "stops." This contract was a sham, as Darminio testified and was only executed to enable Yellow Bird to meet the eligibility requirements of the Trade Waste Division. (Tr. 927-28; DCX "A").

*** Yellow Bird tolerated no competition. On one occasion, in December of 1969, Louis Mongelli of Mongelli Carting Co. attempted to solicit the collection contract at the Riverbay Co-op supermarket, which had just opened up in Co-op City. (Tr. 2415). Mongelli was quickly stopped by Conti. Joseph Mikulka, the supervisor of the supermarket, testified that Conti threatened Mongelli. Immediately after issuing these threats, Conti was standing behind Mongelli with a lead pipe in his hand, and the back of Mongelli's head was bleeding profusely. (Tr. 2484-85). Conti further threatened Mongelli, and stated that he [Conti] was taking over the garbage business. (Tr. 2052). Conti later told Ralph Torres, an employee of Terminal Sanitation, that he had broken Mongelli's head and that nobody would try to collect in Co-op City. (Tr. 695). After this incident the supermarket's garbage was collected by Gambino and Conti through Yellow Bird and its successors up to the date of trial. (Tr. 2053, 2488).

until its application for a carting license was denied. (Tr. 117).

C. Terminal Sanitation Begins to Collect Co-op City.

During the year 1970, Joseph Gambino arranged for Peter Darminio to have his company, Terminal Sanitation begin collecting the Yellow Bird stops in Co-op City. (Tr. 117-18). Gambino told Darminio that because Yellow Bird was unable to get a license, he needed someone to service his Co-op City customers and that Terminal would provide that service and return to Gambino monthly payments in the amount of one-third of all monies collected. (Tr. 119). Gambino required these payments to be made in cash on the 15th or 20th day of each month. (Tr. 119).

In April of 1971, Gambino ordered Peter Darminio to execute a contract on behalf of Terminal Sanitation in which Terminal agreed to purchase the Co-op City stops from Yellow Bird. (Tr. 123). This agreement was necessary in order to comply with Trade Waste Division requirements that all commercial stops be serviced by a licensed cartman. (Tr. 120-21; GX 7). Darminio testified that the contract and its payment provisions were a complete sham and that, in addition to some \$800 monthly notes due on the sale which were paid and credited, Terminal still had to pay Gambino in cash one-third of its receipts from the Co-op City collections. (Tr. 134-36, 941-42).*

* Darminio described the financial arrangements on the purported sale as follows:

"Well, say the [Co-op City] accounts were \$12,000 a month. I would give Carlo Conti a check for \$800 and \$3,200 in cash to Mr. Gambino." (Tr. 9).

The Yellow Bird Terminal sale also included the transfer of a "1969 white" garbage truck for which Darminio paid a \$5,000 down payment and assumed bank notes in the amount of \$660 per month. (Tr. 130).

Beginning in January, 1972, as Co-op City expanded, Peter Darminio's one-third monthly cash payments to Gambino reached the sum of \$4,000 based upon total Co-op City collections of approximately \$12,000 a month. (Tr. 132). These payments of \$4,000 per month continued until November, 1975 when Terminal went out of business and "sold" the Co-op City stops back to Gambino and Conti, then in control of a new carting company, P & S Sanitation: (Tr. 131).*

In or about January, 1972, Carlo Conti became an employee of Terminal and began collecting the Co-op City route. Thereafter, Gambino instructed Peter Darminio that the one-third monthly kickback would be picked-up by Conti. (Tr. 135).

Peter Darminio had difficulty raising the amount of cash required to pay Gambino's one-third monthly share, because many of Terminal Sanitation's customers failed to pay their bills promptly. (Tr. 144). Darminio approached Gambino about this problem and was told by Gambino, "Can't be. My customers pay and I want my money." (Tr. 145). When Darminio's payment problems continued, Conti stepped in. At first Conti threatened Darminio verbally. (Tr. 150-51);** later there were beatings. (Tr. 152-53, 968). The threats and beatings constituted a continuing course of conduct directed at

* This sale was as much a sham as the Yellow Bird-Terminal contract. The contract with P & S was again entered into on Gambino's orders (Tr. 173, GX 10), and although it called for a purchase price of \$56,000 to be paid to the Darminio brothers, they never received a penny. (Tr. 175-76).

** Typical of Conti's verbal threats to Darminio were statements such as "get the money because I don't want to know nothing and Joe wants his money." (Tr. 150); "Have my fucking money when I come back tomorrow." (Tr. 150); and "Have my money, tomorrow, you mother-fucker, or I'll kill you tomorrow." (Tr. 151).

Darminio, who was in fear of Conti. (Tr. 154). Darminio also feared Joseph Gambino who was known to him to be the "boss of the Bronx" (Tr. 159) and the cousin of Carlo Gambino. (Tr. 160-63).

In order to generate the considerable amounts of cash needed to satisfy Gambino, Peter Darminio was forced to draw company checks to his own order and to the order of "cash" and to disguise the withdrawals as expenses. (Tr. 245). Due to this depletion of funds, Darminio's business no longer had a bank account, after July 9, 1973, and Darminio cashed all business receipts at a check cashing establishment on Seventh Avenue in Manhattan. (Tr. 244-46). Darminio was also forced to sell carting stops to raise the cash for Gambino, and to cash the checks he received.

To ensure that Gambino received his one-third monthly cash payments from the Co-op City route, Carlo Conti frequently intercepted Terminal Sanitation's mail and held checks made out to Terminal until a payment to Gambino was due. (Tr. 247-48). Conti would then instruct Darminio to cash the checks because the money belonged to Gambino. (Tr. 248). Darminio always complied and gave the money to Conti to pass on to Gambino. (Tr. 249).

D. Gambino Attempts to Re-acquire the Co-op City Stops

On several occasions, beginning in 1972, Gambino attempted to re-acquire the Co-op City stops which were being serviced by Terminal in his own name. For this purpose, Gambino formed Blue Grass Carting, Inc. (hereinafter "Blue Grass") and ordered Peter Darminio to have Terminal Sanitation enter into a contract with that

company for the sale of the same Co-op City stops that Terminal had acquired from Yellow Bird. (Tr. 166-68; GX 8). Gambino gave Peter Darminio a check for \$7,000 to be held in escrow as a deposit on the contract, but that amount was refunded and the tentative purchase agreement was cancelled when the Trade Waste Division refused to issue Gambino a license for Blue Grass.

During April, 1973, Joseph Gambino's wife Rosalie, along with her father, Nicholas Lentini, applied for a carting license in the name of Country Club Carting, Inc. (hereinafter "Country Club"). Again Gambino ordered Peter Darminio to enter into a tentative purchase agreement between Terminal and Country Club for the sale of the same Co-op City stops involved in both the Yellow Bird-Terminal contract and the Terminal-Blue Grass contract. (Tr. 170-71; GX 9). This sale was never consummated because Country Club's application for a license, like Blue Grass's and Yellow Bird's, was denied.

In November 1975, Terminal entered into a contract which relinquished all of its remaining garbage collection stops in the Co-op City area and other areas of the Bronx to P & S Sanitation (hereinafter "P & S").* Peter Darminio had his brother Anthony sign the contract on Gambino's orders. (Tr. 172-74; GX 10). The

* P & S Sanitation listed as its President, Anthony Sepe, Carlo Conti's brother-in-law. Sepe, a hairdresser with no prior experience in the sanitation industry served as a front for Carlo Conti having no duties or responsibilities in the operation and management of P & S. (Tr. 2061, 2062-64, 3028-29). In fact, P & S was operated by Conti who serviced the Co-op City route and Gambino who was active in the management of P & S (Tr. 268). Gambino kept the books and records of P & S at a market which he owned; Gambino assisted P & S's bookkeeper, Josephine Darminio, in writing checks and was himself on the P & S payroll for five weeks immediately preceding the filing of the indictment. (Tr. 270-74, 3029; GX 15).

stops which were transferred to P & S included those originally transferred to Terminal by Yellow Bird in 1971 (GX 7), and those included in the tentative purchase agreements between Terminal and Blue Grass (GX 8) and Terminal and Country Club Carting (GX 9; Tr. 174).

E. Peter Darminio Borrows from Joseph Gambino.

Throughout the period 1969 to 1974 Peter Darminio was constantly borrowing money from Joseph Gambino for both business and personal reasons. (Tr. 176-79). In 1971 Darminio's various loans from Gambino totalled \$90,000. Gambino came to Peter Darminio's home with a piece of paper * which contained a listing of every loan which Gambino had made and demanded repayment. (Tr. 180; GX 12). Darminio told Gambino he couldn't raise that kind of money and would have to sell a stop, to which Gambino replied, "Sell your stops, do what you got to do. I want my money." (Tr. 193).

Thus, Darminio was forced to sell one of his most lucrative stops, the Pathmark Supermarket on Bruckner Boulevard to repay the \$90,000 in loans. (Tr. 192-93). Although the Mongelli Carting Co. had put down a \$10,000 deposit to purchase the Pathmark stop from Terminal, Gambino ordered Peter Darminio to sell the stop to Palompelli Carters. (Tr. 193-94, 3024).** Pro-

* It was stipulated that the piece of paper was in Gambino's handwriting. (Tr. 267).

** When three members of the Palompelli family, Thomas, Jr., Clement and Jennie, were called by the Government to testify about this transaction, all three chose to assert their fifth amendment privilege against self-incrimination. After the Court conferred immunity upon them pursuant to 18 U.S.C. § 6002, they persisted in their refusals to testify and were found to be in criminal contempt. Thomas, Jr. and Clement were sentenced to three months imprisonment and Jennie Palompelli was fined \$1,000.

ceeds of the sale were paid by Thomas PalomPELLI, Sr. directly to Gambino to repay the \$90,000 debt. (Tr. 195-96, 976).

In August, 1972 Peter Darminio borrowed \$75,000 from Joseph Gambino. This loan was, in effect, a consolidation of prior debts, including unpaid monies from the Co-op City collections which Darminio owed Gambino, as well as monies Darminio owed to other loansharks. (Tr. 197-98). The terms of the loan required that Darminio pay Gambino \$1,250 per week until both the principal as well as \$70,000 interest were repaid. Darminio paid the weekly cash installments directly to Gambino or to Conti, and maintained a contemporaneous record of the weekly payments in his diary. (Tr. 199-200, 214, 981; GX 13). The diary lists eighty (80) weekly payments, each in the amount of \$1,250, from September 4, 1972 to March 5, 1974. (Tr. 235-38). On March 5, 1974, Gambino ordered Darminio to immediately repay the remaining balance on the loan, \$45,000, in one lump sum. (Tr. 213, 235-38). In order to comply with this demand Darminio had to borrow the \$45,000 from Daniel Hogan, another loanshark, to pay Gambino. (Tr. 213). The \$45,000 was taken by Daniel Hogan and Anthony Darminio to Carlo Conti's house where it was counted by Mrs. Conti. After the money was counted, Carlo Conti called Joseph Gambino and told him that the money had arrived. (Tr. 985-86).

Peter Darminio encountered serious consequences whenever he was unable to make the \$1,250 a week cash payments on the \$75,000 loan. On some four or five occasions Conti beat Darminio for failure to pay an installment or for being late. (Tr. 201-02). At other times Conti parked his car in front of the Terminal garage and prevented the trucks from making any garbage pickups. (Tr. 202, 1008). Notably, when Conti interfered with

the Terminal business in this manner he did allow one truck out to pick up "Joe's route," the Co-op City stops. (Tr. 203, 637).

Gambino himself struck Peter Darminio for failing to make a payment on one occasion in 1973, at Gambino's restaurant on Westchester Avenue and told Darminio, "Go get my money." (Tr. 203-04, 714-15).^{*} Because he feared such mistreatment, Peter Darminio went into hiding in motels, restaurants, subway stations and garages when he could not pay the loan instaliments (Tr. 206-07), which made it impossible for him to conduct his business. (Tr. 207). Further, Peter Darminio's brother Anthony, and Ralph Torres, a Terminal employee, were each beaten by Conti on occasions when they would not divulge the whereabouts of Peter Darminio. (Tr. 991, 768).^{**}

F. Sale of Terminal Stops.

Because he constantly needed large sums of money to pay Gambino, both on the \$75,000 loan and the one-third monthly cash payments from the Co-op City collections,

^{*} Ralph Torres accompanied Peter Darminio to Gambino's pizza restaurant on the day Darminio was slapped by Gambino. Torres testified that he waited in a car outside and saw Peter Darminio emerge from the restaurant and heard Darminio say he was slapped by Gambino. When asked if he saw anything on Darminio's face, Torres replied:

"I seen five finger marks, like I seen the tears coming out of his eyes." (Tr. 715).

^{**} Anthony Darminio testified that he was beaten on numerous occasions by Carlo Conti, including one incident at the Terminal garage where Conti attempted to shoot Anthony Darminio's hand off with a gun. (Tr. 990-91, 1007-08, 1015). This incident was witnessed by Ralph Torres who saw Conti take the gun out of his car. (Tr. 771-72). Torres himself was threatened and beaten by Conti when he would not divulge the whereabouts of Peter Darminio. (Tr. 768).

Peter Darminio was forced to sell Terminal stops to other Bronx cartmen. (Tr. 249-52).*

Darminio also became unable to pay promissory notes owed to Bernard Ettinger from whom he had originally purchased Terminal Sanitation in 1968. (Tr. 1213). Ettinger held a mortgage on the Terminal stops, which he had registered with the Department of Consumer Affairs, Trade Waste Division, as well as mortgages on the houses of Peter and Anthony Darminio. (Tr. 1214). In 1971 and 1974 Ettinger sent letters to the Department of Consumer Affairs complaining about non-receipt of payment from Peter Darminio. (Tr. 1215-16; GX 17, 18). Ettinger became particularly upset when he learned that Terminal had sold some of its stops to other cartmen, and he threatened Peter Darminio that he would inform Consumer Affairs in an effort to stop these and any future sales. (Tr. 1217-19). Ettinger also commenced foreclosure proceedings on Anthony Darminio's house. (Tr. 1214).

Anthony Darminio went to Joseph Gambino to complain about the mortgage foreclosure and told Gambino that he and his brother were having problems paying Ettinger, to which Gambino replied, "Don't worry about it. I'll send Carlo Conti to straighten it out." (Tr. 1018-19). Subsequently, Carlo Conti paid a visit to Bernard Ettinger's office and struck Ettinger across the face, telling him that it would be better for him not to make any phone calls to the Department of Consumer Affairs. (Tr. 1219). After Conti's visit, Ettinger never again complained to the Department of Consumer Affairs. (Tr. 1220).

* Significantly, Peter Darminio was never allowed to sell any of the stops in Co-op City which belonged to Gambino and in fact was even required to clear any prospective sales of stops with Gambino to insure that he was not selling any of Gambino's properties. (Tr. 258).

In 1974, Ettinger, Gambino, Peter Darminio, and Joseph Parrillo (who owned Du-Rite Sanitation, a Bronx private sanitation company) met in Ettinger's office. (Tr. 1222). An agreement was reached pursuant to which Darminio would sell some stops to Parrillo and use the proceeds to pay his delinquent notes to Ettinger. Ettinger was owed \$90,000, but Gambino urged Ettinger to settle for less to allow Terminal to stay in business. (Tr. 1233-34). Ettinger settled for \$40,000, and Gambino handed over a deposit of \$5,000 in cash as a down payment on the sale of stops by Terminal to Parrillo's Du-Rite Sanitation. Parrillo re-paid this amount to Gambino a few days later. (Tr. 1225, 3028). The repeated sale of its garbage collection stops eventually resulted in the demise of Terminal as a business entity.

G. American Automated.

In August, 1976, the Federal Bureau of Investigation began an investigation of organized crime in the private sanitation industry in New York City. (Tr. 1421). For this purpose, the FBI incorporated American Automated Refuse and Wastepaper Removal, Inc. (hereinafter "American Automated"), a private sanitation company with offices at 80 Westchester Square, Bronx, New York. (Tr. 1339). In September, 1976, American Automated began soliciting garbage collection accounts both in Manhattan and the Bronx.

On December 1, 1976 American Automated entered into an agreement with Harry's Service Station, 1000 Baychester Avenue, in Co-op City, to service the garbage collection needs of that business and left a garbage container there on December 13, 1976. (GX 30, Tr. 1342).*

* Prior to December 1, 1976 the refuse at Harry's Service Station had been collected by Carlo Conti of P & S Sanitation. P & S took over the account at Harry's from Terminal Sanitation in November, 1975.

Two days later Carlo Conti came to American Automated's office and proceeded to threaten to murder the person seated at the desk who called himself Wayne Dacon but was in fact Walter Wayne Orrell, a Special Agent of the FBI. (Tr. 1346-48).^{*} Conti told Orrell that all of Co-op City belonged to him and that even the new stops which were to open up there were his. (GX 31, pp. 3, 10; Tr. 3031). On two occasions Conti struck Special Agent Orrell on the head, after first ordering him, on pain of death, to cancel American Automated's contract with Harry's Service Station. At Conti's insistence, Orrell did phone Harry's Service Station and cancel the contract. Orrell subsequently caused American Automated's container to be removed from Harry's, an action which Conti had ordered. Orrell testified that upon one of the occasions when he was struck by Conti, he felt himself losing consciousness. (Tr. 1348).

Throughout the period of its operation, August, 1976 through March, 1977, American Automated functioned in interstate commerce. (Tr. 1422-39). In the course of conducting its business, American Automated dumped refuse at Industrial Land Reclaiming in New Jersey and paid that company a total of \$118.50 for that service. (GX 39). American Automated acquired garbage trucks from a U.S. Army post in Texas; it purchased a winch for one of those trucks from the Pak-Mor Corporation

^{*} These threats were recorded and included such statements by Conti as:

"You hear my name, P & S Sanitation or C Sanitation, you stay the fuck away. 'Cuz next time I'll kill you. I'll come in the fucking office and blow your fucking brains out. And I'll let you call the cops and then I'll kill them too. You hear?" (GX 31, p. 9, Tr. 1360).

and

"Go to anybody. You know wise guys, you know racket guys, go to them and tell them Carlo says he's gonna kill me." (GX 31, p. 10, Tr. 1360).

in San Antonio, Texas; and it purchased large quantities of burlap liner bags from Atlantic Bag Company. These bags originated outside the United States. (GX 37). They also purchased supplies from a stationery company in Hackensack, New Jersey (GX 33) and furniture from a company in Maywood, New Jersey. (GX 34). American Automated paid dues to the Insurance and Pension Trust Fund of Local 813, a local labor organization within the International Brotherhood of Teamsters. (GX 36). Tolls were paid on the George Washington Bridge (GX 41), and the New Jersey Turnpike (GX 40) and gas was purchased in New Jersey in the ordinary course of its business. American Automated paid some \$400 to Industrial Truck Body Corporation of Elizabeth, New Jersey for repairs to its equipment and in addition, paid that company several hundred dollars for equipment rental. (GX 38). Finally, American Automated supplied its customers with containers made out-of-state. (GX 35). One such container was deposited at Harry's Service Station on December 13, 1976.

H. Gambino's Evasion of Income Taxes.

The tax case against Gambino was based primarily upon specific items * of income received from his undisclosed ownership of the Co-op City sanitation route

* The specific items of income were derived from the evidence given by Peter and Anthony Darminio as reflected in the schedule below:

SOURCE	1972	1973	1974	1975
1. Interest Income from Loansharking	\$11,050	\$34,450	Gambino acquitted	
2. Income from Private Carting Routes	48,000	48,000		\$44,000
	<u>\$59,050</u>	<u>\$82,450</u>		<u>\$44,000</u>

during the years 1971 through 1975 and the substantial amounts of interest income which Gambino earned from loansharking during the years 1972, 1973 and 1974, all of which he failed to report on his tax returns for those years. The Government substantially corroborated the specific items by the expenditure method of proof.* The Government showed that as of January 1, 1970 Gambino had no substantial accumulation of funds or property and that prior to 1970 he had no substantial income. Nevertheless, in each of the taxable years 1970 through 1975 Gambino spent far more than he was reporting on his income tax return as the following schedule reflects:

	1970	1971	1972	1973	1974	1975
Total Expenditures	\$82,616	\$62,135	\$102,085	57,438	Gambino acquitted	\$49,055
Taxable Income Reported by Gambino	\$10,809	\$19,026	\$ 20,909	\$22,724		\$ 7,777
Taxable Income Not Reported by Gambino	\$45,275	\$39,730	\$ 59,050	\$82,450		\$44,000

The expenditures derived from such sources as increases in Gambino's bank accounts, investments in Gambino's two retail pizza business's, restaurant and real estate in Nyack, New York, personal expenditures such as rent, utilities, household, motor vehicles, attorney's fees and loans of \$90,000 to Peter and Anthony Darminio in 1970 and 1971, as well as loans to other individuals.

* A large majority of the expenditure proof was received by the Court below through stipulations by the parties (GX 19, 20A, 20B, 20C, 21B, 21C, 22, 23, 23A, 24A, 25B, 26).

The Defense Case

Gambino presented testimony of persons from whom he had purchased supplies and equipment for his restaurant, Joseph's Pizza on Westchester Avenue in the Bronx. The suppliers testified either that they gave Gambino equipment for free or that they charged him very little for it. (Tr. 2303-17, 2324-33).

Gambino's accountant, Samuel Cutler, testified that certain expenditure items which the Government had charged to Gambino in certain tax years were not chargeable to him as a matter of accounting practice. (Tr. 2583-2616).

Conti called Louis Mongelli who testified that although he was soliciting the refuse removal account of the Riverbay Co-op supermarket in December, 1969 he was never struck by Carlo Conti but actually slipped and fell on some construction debris. (Tr. 2404-07).

Neither Gambino nor Conti testified.

The Rebuttal Case

The Government called Special Agent William Boltja of the Internal Revenue Service, who disputed the expenditure items which Samuel Cutler had characterized as not chargeable to Gambino. (Tr. 2694-2726).

Abraham Melshenker, the manager of the Riverbay Co-op supermarket, testified that in 1969 he observed Conti and Mongelli in a violent argument over who would collect the garbage at that location. Melshenker saw Conti with a lead pipe in his hand standing over Mongelli who was bleeding from the head. (Tr. 2484-85). Melshenker testified that after this incident garbage at the Riverbay Co-op supermarket was collected by Carlo Conti

of Yellow Bird Carting, later by Terminal Sanitation, and as of the day of his testimony, by P & S Sanitation. (Tr. 2488).

ARGUMENT

POINT I

The Evidence Was Overwhelming that Gambino and Conti Were Guilty of the Conspiracy and Substantive Violations Charged in Counts One, Two and Four.

Gambino and Conti argue that there was insufficient evidence to sustain their convictions for the conspiracy charged in Count One, as well as for the substantive violations charged in both Counts Two and Four.* These claims of insufficiency are meritless because the evidence, both direct and circumstantial, was overwhelming and wholly corroborated.

* Point One will address itself to the insufficiency arguments raised in Points One, Three and Four of Gambino and Conti's joint appellate brief.

The conspiracy charged essentially three objects: (1) that defendants acquired and maintained an interest in Terminal Sanitation, its business assets and contractual rights, including all customer accounts, through a pattern of racketeering activity which included extortion and the collection of unlawful debts; (2) that the defendants acquired and maintained control of the commercial garbage removal industry in the Co-op City area and other areas of the Bronx through a pattern of racketeering activity; and (3) that the defendants conducted the affairs of P & S Sanitation through a pattern of racketeering activity which included extortion.

Count Two charged that the defendants acquired and maintained an interest in Terminal Sanitation, its business assets, contractual rights and all customer accounts, through a pattern of racketeering.

Count Four charged that Gambino and Conti collected a \$75,000 loan to Peter Darminio by means of extortion.

To support their claims of insufficiency, Gambino and Conti present an inadequate and self-serving review of the evidence. (Br. 11-19). While we agree as they argue, that mere association with a conspirator or simple knowledge that something is illegal does not constitute proof of participation in a conspiracy, *United States v. Garguilo*, 310 F.2d 249, 253-59 (2d Cir. 1962), that is not what this case is about. The evidence here showed that Gambino not only "knew about the enterprise and intended to participate in it or make it succeed," *United States v. Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974), but that Gambino himself directed and maintained a monopoly on commercial garbage collection in Co-op City and elsewhere in the Bronx through extortion, violence and loansharking.

Of course, in reviewing the evidence, this Court is required to evaluate it in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974). This standard of review is not changed by the fact that this case was tried to a judge rather than to a jury. *United States v. Tutino*, 269 F.2d 488 (2d Cir. 1959). Further, as to any facts which may have been disputed during the trial, Judge Ward's determination cannot be upset on appeal except under extraordinary circumstances. *United States v. Gard*, 344 F.2d 120 (2d Cir. 1965).

A. Count One—The Conspiracy

The existence of the conspiracy charged in Count One was proved overwhelmingly by both direct and circumstantial evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Green*, 523 F.2d 229, 234 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Tyminski*, 418 F.2d 1060, 1062 (2d Cir.

1969), *cert. denied*, 397 U.S. 1075 (1970); *United States v. Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). The evidence established that in this criminal enterprise Gambino was the boss, while Conti functioned as his underling enforcer and collector. The relationship between the two dated back to their partnership in Columbus Lease Corp., a company engaged in garbage removal operations at the Mount Vernon incinerator (Tr. 1273, 1281), and continued in 1970 and 1971 during the formation of Yellow Bird and the initial take-over of the commercial garbage removal industry in Co-op City.

According to the testimony of Ralph Torres, who drove the Co-op City route together with Conti from 1970 through 1972, Gambino and Conti met with each other practically every day at Gambino's restaurant. (Tr. 630-32). Oftentimes Conti would leave the garbage route during work to meet with Gambino. (Tr. 776). Indeed it was Gambino who, together with Conti, originally showed Torres which stops to pick up in Co-op City. (Tr. 138).

The evidence of the defendants' conversations with the witnesses in this case was replete with references by Conti to Gambino and by Gambino to Conti. (Tr. 133-34, 150, 164, 637, 986).^{*} Not only did the two constantly

^{*} Conti consistently referred to the stops in Co-op City as "Joe's route" (Tr. 637) and when Conti was collecting the one-third payments he routinely threatened Peter Darminio and said "Joe wants his money." (Tr. 150). Gambino's involvement in the Co-op City route was evidenced by his telling Conti to make sure that the route was cleaned up and that he (Gambino) got his money (the one-third payments). (Tr. 163-64). Conti told Ralph Torres that Co-op City was Gambino's route (Tr. 636-37), and Gambino himself once asked Torres, "How do you like my route?" (Tr. 626). All of these incidents, of course, occurred subsequent to Yellow Bird's "sale" of Co-op City stops to Terminal and when Terminal handled all of the servicing of the stops.

refer to each other, but their actions clearly showed them to be working in concert. Specifically, on Gambino's orders Conti forced Peter Darminio to pay one-third of the receipts from the Co-op City route to Gambino. (Tr. 120-23, 132-34, 144-45, 147, 150, 163-64). When Darminio had difficulty making the one-third payments to Gambino, Conti collected for Gambino using threats and violence. (Tr. 152-53). Later, when Darminio had to make payments of \$1.250 per week on the \$75,000 loan from Gambino, he gave the payments to Conti. (Tr. 199).^{*} If Darminio had problems making the \$1,250 per week payments to Gambino he was beaten by Conti and Conti disrupted the business of Terminal by preventing the trucks from making pick-ups. (Tr. 202-03). Conti did allow the Terminal trucks to pick up the Co-op City route, which Conti referred to as "Joe's route." (Tr. 202-03, 637). Ordinarily, Darminio made the weekly payments to Gambino at his restaurant, Joseph's Pizza, or Conti picked up the money at Terminal's office or garage. (Tr. 240-41). To assure that Darminio made both the one-third payments and the loan payments, Conti intercepted Terminal's mail and held checks made out to Terminal from customers because it was "Joe's money," and forced Darminio to endorse the checks for Gambino. (Tr. 247-48).

The record contains testimony about an incident involving Bernard Ettinger which illustrates Gambino and Conti's practice of acting in concert. Ettinger held a mortgage on both the stops which he sold to Terminal and on the Darminio brothers' homes. As Ettinger became increasingly upset over the failure of the Darminios

^{*} Gambino made another usurious loan to Peter Darminio's brother-in-law, Steve Fortunato, and Darminio vouched for the loan. After Fortunato defaulted, Darminio was ordered by Gambino to assume the loan and had to make payments of \$500 per week to Conti. (Tr. 242-43).

to repay his monthly notes and over Terminal's sale of stops to other Bronx cartmen, he commenced foreclosure proceedings on Anthony Darminio's house. (Tr. 1219). Concerned about his home, Anthony Darminio complained to Joseph Gambino about Ettinger and was told by Gambino, "Don't worry about it. I'll send Carlo Conti to straighten it out." (Tr. 1018-19). Conti did indeed straighten Ettinger out. After being struck across the face by Conti, Ettinger ceased making trouble for the Darminios and did not interfere again with their sales of Terminal stops. Eventually Ettinger settled for \$40,000 on a \$90,000 balance owed by the Darminios.

Gambino complains that while much of the Government's proof involved physical violence perpetrated by Conti, there was little violence directly involving him. (Br. 13). Such was not the case. The proof showed that Gambino himself threatened Peter Darminio and actually forced the sale of the Pathmark Supermarket on Bruckner Boulevard in order to satisfy the \$90,000 in loans owed to him by Peter Darminio. Further Gambino coerced and supervised the sale of other Terminal stops. (Tr. 202, 192-93, 204, 968, 975-76). Gambino himself used physical violence when necessary; on one occasion he slapped Darminio across the face when Darminio was late making a weekly payment on the \$75,000 loan. (Tr. 203-04, 714-15).

Finally, the Government showed at trial that all of the threats and violence perpetrated by Conti were done on the orders and at the behest of Gambino, and Gambino therefore bears substantive responsibility for offenses committed by Conti. *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946); *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975); *United States v. Cobb*, 446 F.2d 1174, 1177 (2d Cir.), *cert. denied*, 404 U.S. 984 (1971).

B. Count Two—The Pattern of Racketeering Activity

Not only did Gambino and Conti conspire to acquire and to maintain a monopoly on commercial garbage collection in Co-op City and elsewhere, but they accomplished the objects of the conspiracy, including the acquisition of an interest in the business assets, contractual rights and customer accounts of Terminal Sanitation.

In so doing, the acts charged in Counts Two through Five, constituted a pattern of racketeering activity. As that term is defined in the statute, 18 U.S.C. § 1961(5), a "pattern of racketeering activity" is two or more acts in violation of certain specified federal criminal statutes (including the Hobbs Act, § 1951 and the statutes against extortionate credit transactions, § 894). In this case the proof went far beyond the minimum requirement of two acts and established a long series of Hobbs Act violations as well as at least two extortionate credit transactions.

These activities included the acquisition and maintenance by the defendants of an interest in and control of Terminal Sanitation, as well as control of garbage collection in Co-op City. Defendants acted together in directing Peter Darminio to buy the Co-op City route for Terminal. By means of numerous threats and acts of violence, defendants maintained their interests in Terminal and exacted one-third of the proceeds from the Co-op City route, although those stops were legally owned and serviced by Terminal Sanitation.

Conti stopped Terminal trucks from servicing Terminal routes (Tr. 202, 766, 992, 1008-09), forced Peter Darminio to neglect the routes to collect and to pay money to Conti and Gambino (Tr. 762), beat and

threatened Anthony and Peter Darminio and Ralph Torres (Tr. 768-69, 774-75, 989), intercepted and controlled payments to Terminal by customers (Tr. 247-48, 731-35) and directed the employees of Terminal Sanitation in the performance of their duties (Tr. 780).

The defendants ultimately re-acquired title to the Co-op City stops when the route was "sold" to P & S Sanitation. (Tr. 173, 176). As P & S Sanitation, the defendants continued to assert their control over Co-op City and continued to attain their ends by the use of physical violence. This fact was nowhere more dramatically demonstrated than in the beating by Conti of an undercover FBI agent who had solicited a Co-op City stop. Thus, from the time when Conti beat Mongelli for soliciting a Co-op City stop in 1969, until December, 1976, when Conti attacked an FBI agent posing as a cartman, things remained unchanged in Co-op City.

C. Count Four—The \$75,000 Loan

Defendants also complain of insufficient evidence to sustain their convictions on Count Four, which charged them with the use of extortionate means to collect the \$75,000 loan to Peter Darminio. (Br. 23-25).^{*} Although defendants concede that Section 894 is violated when force and violence are used to collect an extension of credit, *United States v. Natale*, 526 F.2d 1160, 1165 (2d Cir.

^{*} It is difficult to ascertain the exact nature of defendants' claims of insufficiency with regard to the extortionate credit transaction charged in Count 4. On the one hand, defendants claim that they suffer because of an intermingling of facts and circumstances surrounding various borrowing by the Darminios. (Br. 23). On the other hand, they claim that the District Court erred in crediting the testimony of Ralph Torres who specifically corroborated the testimony of the Darminios concerning the \$75,000 loan to Peter Darminio, his inability to make the \$1,250 a week payments on that loan, and the resultant threats and beatings which Darminio received from Conti and Gambino.

1975), *cert. denied*, 425 U.S. 950 (1976), they fail to specify how these elements were not proved by the Government's case.

As the proof amply demonstrated, and as the District Court found (Tr. 3025-26), Peter Darminio borrowed the sum of \$75,000 from Joseph Gambino in August, 1972. Darminio borrowed because he needed money to pay Gambino his one-third monthly tribute, and to pay expenses and other loansharks. (Tr. 197, 946). For eighty weeks (September, 1972, until March, 1975), Darminio paid Gambino \$1,250 a week. These payments were noted in a diary kept by Darminio. (GX 15). When Peter Darminio was slow in making these payments, he was threatened and beaten on numerous occasions by Conti and once by Gambino himself.

Peter Darminio's testimony with regard to the \$75,000 loan was corroborated by his brother, Anthony. Anthony witnessed the beatings, accompanied his brother to Gambino's restaurant to make payments and helped procure a \$45,000 loan from Daniel Hogan when Gambino demanded immediate payment of the balance of the loan. (Tr. 984, 987-89). Ralph Torres also corroborated Peter Darminio's testimony. Torres also witnessed the beatings, accompanied Peter Darminio to Gambino's restaurant to make weekly payments, and saw Peter Darminio record payment notations in his diary. (Tr. 713-19).

Thus, the elements of Section 894 were more than sufficiently proved against each of the defendants.*

* Seemingly as an afterthought, defendants contend there was insufficient corroboration of the Darminio's testimony with respect to Counts 1 through 4. (Br. 26). Anticipating the Government's answer to this argument, *i.e.*, that the Darminio's testimony was corroborated in each and every respect by Ralph Torres, defendants still contend that there was insufficient corroboration. The simple answer to this argument is that Judge

[Footnote continued on following page]

POINT II**The Government's Proof Established All of the Elements of the Hobbs Act Conviction Charged in Count Three.**

Both defendants argue that their convictions under Count Three for violations of the Hobbs Act must be reversed because the payments of money which they were alleged to have extorted from Terminal Sanitation were a property right belonging to Gambino, who according to the Government's theory, always owned the Co-op City route. Defendants contend that under these circumstances there can be no extortion because one cannot extort from another what is rightfully his. Their argument is completely without merit.

First, defendants never made this argument in the court below and have therefore waived it for purposes of appellate review, *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Their failure to raise the claim in the District Court is understandable since this argument is entirely inconsistent with Gambino and Conti's defense at trial, which was that they never owned the Co-op City route after the transfer from Yellow Bird to Terminal in April, 1971 (Tr. 127, GX 7), notwithstanding the testimony of the Darminio brothers.*

Ward chose to credit the testimony of the Darminio's *because* it was corroborated by Torres. It is a distortion of the record to isolate Torres' testimony and view it as though the Darminios had not also testified. The District Court had the right, indeed the duty to view the evidence in toto, as was done in this case.

* It would have been difficult for Gambino to have taken the position at trial that the Co-op City stops belonged to him after the transfer of those stops from Yellow Bird to Terminal in early 1971. Had he done so Gambino would have been forced to acknowledge his guilt on the tax evasion counts, all of which charged him with failure to report income from the Co-op City route.

Furthermore, even assuming *arguendo* that the issue were to be considered on its merits, Gambino and Conti have grounded their argument on a fatally defective factual premise, namely, that the monthly payments which Gambino and Conti extorted from Terminal came from customer accounts collected in Co-op City. In fact, Peter Darminio testified that this was not the case. Darminio stated that he was unable to comply with Gambino's demand that he be paid one-third of the Co-op City collections on the 15th or 20th day of each month because many of those customers failed to pay their bills on time and consequently he could not pay Gambino on time (Tr. 144-45). When this occurred, Gambino sent Conti to collect the one-third payments. Conti employed threats and beatings as a regular tool of his collection method. Conti's methods sent Darminio scrambling for money. At first Darminio would make Terminal checks out to himself or to cash to pay Gambino. These monies derived from all of Terminal's business, some 300 customers, most of whom were not in Co-op City and not related in any way to Gambino. (Tr. 165). Moreover, Darminio went to other loansharks to get money to pay Gambino. (Tr. 165). Most importantly, Darminio sold Terminal stops which were his, not Gambino's. (Tr. 165). None of the funds from these three sources derived from Co-op City collections. Therefore there is no factual basis for Gambino's argument that the Government failed to prove extortion, because one cannot extort what is rightfully his.

A further defective premise upon which the defendants ground their argument is that the customer accounts in Co-op City ever belonged to Gambino in the first place. Certainly the proof showed that Gambino and Conti took it upon themselves to control all commercial refuse collection in Co-op City and there was proof that when

Co-op City first opened in 1968-69, the commercial refuse there was collected by Yellow Bird Sanitation, a firm the defendants controlled. At no time, however, did legal title to customer accounts in Co-op City ever vest in either of the defendants. Indeed Yellow Bird never received a license from the Trade Waste Division of the Department of Consumer Affairs and therefore never had legal title to any of the Co-op City accounts. Yellow Bird and its listed President, Carlo Conti, were only able to maintain control of those accounts by threatening and beating any competitor who attempted to solicit in that area, much as they did in the case of Louis Mongelli.*

Defendants' theory must also fail as a matter of law. Section 1951(b)(2) defines the term extortion as follows:

"(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." **

All that is required under this definition is that the property right be obtained from another by the wrongful use of threatened force, violence or fear. The statute, and cases brought thereunder, say nothing about that section's non-applicability when the extortionist has a

* When Mongelli solicited an account in Co-op City Conti brutally struck him over the head with a metal object. (Tr. 2484-85).

** A comparison of this language with the definition of "extortion" quoted in appellants' brief at page 20 reveals that they present language not contained in the statute. Counsel for defendants appear to have simply made up their own statutory definition of extortion, a definition which supports the theory which they expound before this Court but which is not the one legislated by Congress.

claim of right to the property which he extorts from the victim.*

Indeed in one of the cases cited by defendants, *United States v. Nakalański*, 481 F.2d 289 (5th Cir.), cert. denied, 414 U.S. 819 (1973), the Court of Appeals for the Fifth Circuit affirmed the convictions of two defendants for violation of Section 1951 in a case where those defendants loaned sums of money totalling \$12,000 to one Whitice. Whitice was unable to repay the loans and the interest thereon, and received threats from the defendants as a result. The Fifth Circuit held, in the context of a loan where defendants surely had a claim of right to the property of Whitice, that all that was necessary for the Government to show was:

“(1) that appellant’s induced Whitice to part with property; (2) that they did so through the wrongful use of actual or threatened force, violence or fear; and (3) that in so doing they adversely affected interstate commerce.” *Id.* at 298.

Defendants next contend that the Government “did not prove that the appellants’ collection of sums of money from Peter Darminio had a causal effect on the interstate commerce which Terminal was engaged in.” (Br. 21). In making this argument defendants conveniently neglect to mention that they stipulated that Terminal Sanitation (both the partnership and later the corporation) was in interstate commerce within the meaning of 18 U.S.C.

* Defendants cite *United States v. Enmons*, 410 U.S. 396 (1973) in support of the proposition that extortion does not include the obtaining of one’s own property. (Br. 21). A careful reading of that case however reveals only that the Hobbs Act does not reach the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services, sought by union strikers from their employer.

§ 1951. (Tr. 267). As to any causal effect on interstate commerce, the language of the Hobbs Act makes it clear that interference or attempted interference with interstate commerce "in any way or degree" is prohibited, even if the effect is only minimal. *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). The effect on interstate commerce may be merely potential or subtle. *United States v. Augello*, 451 F.2d 1167, 1170 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972); *United States v. Tropiano*, *supra*, 418 F.2d at 1076-77; *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954). The breadth of the statutory language has been recognized by the Supreme Court as invoking "all the constitutional power Congress has to punish interference with interstate commerce..." *Stirone v. United States*, 361 U.S. 212, 215 (1960); *United States v. Tropiano*, *supra*, 418 F.2d at 1076-77. This concept was recently re-emphasized in *United States v. Staszczuk*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975), in which the Court found that the intent of Congress and the power to implement that intent required consideration in Hobbs Act cases of the consequences of the class of extortionate transactions exemplified by the conduct in issue. The Court stated:

"We hold...that the commerce element of a Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic possibility that an extortionate transaction will have some effect on interstate commerce." 517 F.2d at 59-60 (footnote omitted).

In this case, the evidence adduced at trial showed that the action of the defendants, in extorting monthly payments of cash from Terminal caused that company to divest itself of *all* other customer accounts and eventually resulted in the demise of that business. (Tr. 165). Under these circumstances any contention that defendants' actions had no "causal effect" on interstate commerce is totally devoid of merit.

POINT III

The Government Did Not "Contrive" Jurisdiction and Conti's Conviction on Count Five Should Remain Undisturbed.

Relying heavily upon dicta in *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973), Conti contends that his conviction under Count Five must be reversed because of alleged Governmental misconduct in "contriving" federal jurisdiction by the creation of American Automated. This contention is entirely without merit. The underlying premise, in support of Conti's argument, is that American Automated was created by the Government solely for the purpose of inducing him to violate the Hobbs Act, and to that end an interstate jurisdictional nexus was fabricated. (Br. 29). The proof at trial was otherwise.

American Automated was created in or about August, 1976 as an undercover project of the FBI designed to investigate the influence of organized crime in the private sanitation industry. At its inception the focus of American Automated's attention was Manhattan, and only later did the investigation focus on the Bronx. (Tr. 1421).^{*} American Automated was incorporated in the

^{*} Significantly Conti and Gambino's company, P & S Sanitation, did not even operate in Manhattan.

State of New York in September, 1976, some four months before the December 15, 1976 incident with Conti. (Tr. 1422). The company applied for a license from the Trade Waste Division of the Department of Consumer Affairs in November, 1976, and received that license in early January, 1977. (Tr. 1471-72). Further, after the assault by Conti, American Automated continued to expand its operation by applying for new forms of licensing. (Tr. 1975). The company operated until May 1, 1977.

Given this background, Conti's assertion that American Automated was formed solely to induce him to violate the Hobbs Act, is not supported in a record. In any event, Conti's reliance on Archer is *misplaced*. First, in its *per curiam* opinion denying the Government's petition for rehearing in *Archer*, this Court "specifically declined to decide whether [it] could or should dismiss the prosecution as an abuse of federal power," basing its decision instead upon an absence of sufficient use of interstate and foreign telephone facilities. 486 F.2d at 684 (*per curiam*). See *United States v. LeFaivre*, 507 F.2d 1288, 1293 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

Second, the present facts are readily distinguishable from those in *Archer* where Federal jurisdiction was premised upon limited and isolated interstate and foreign telephone calls on intrastate wires.* The activities of American Automated were systematically and necessarily wedded to interstate commerce. It purchased extensive equipment and supplies, including trucks, winches, furni-

* In distinguishing *Archer* the District Court stated that:
 "The Government had a right to establish this lawful enterprise and in connection therewith to solicit persons who might become customers. The defendant Conti chose to react as he did and must face the consequences of his acts. Therefore, the Court rejects the defense of contrived jurisdiction." (Tr. 3033).

ture, stationery, liners and containers from companies throughout the United States, which companies in turn made their purchases throughout the world. (Tr. 1427-90). See *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969). The very core of American Automated's business involved the dumping in New Jersey of refuse collected in the Bronx and Manhattan. Its purchases were based purely upon strict cost analyses, and its refuse was dumped in New Jersey because dumping rates in that contiguous state were far cheaper than those in New York. (Tr. 1558-60). In each of these activities and purchases, American Automated functioned in complete accordance with the normal practices of comparable Bronx private carting concerns.

Contrary to Conti's suggestion, the Government's activity did not induce or entrap Conti into committing a crime.* Conti could as easily have reacted to the competition imposed by the Government in a lawful fashion, (for example, by lowering his rates to Harry's Service Station), as in the abusive, violent and unlawful manner which he chose instead. Rather, purely of his own violation, Conti used violence and threats and attempted to extort American Automated from competing in his commerce-related industry. Cf. *United States v. Hampton*, 425 U.S. 484 (1976); *United States v. Ordner*, 554 F.2d 24 (2d Cir. 1977).

In any event, this Court need not reach this claim because even if the Court were to agree with Conti's attack on Count Five, there remain four other counts where the evidence is unassailably sufficient, where no claim of collateral consequences from the inclusion of Count Five has been made and on which the defendant received sentences concurrent with the sentence on Count Five.

* Conti's claim of entrapment, rejected by the District Court (Tr. 3032), has been abandoned on appeal.

United States v. Tejias, 552 F.2d 435, 444-45 (2d Cir. 1977); *United States v. Hanlon*, 548 F.2d 1096, 1099 (2d Cir. 1977); *United States v. Vasquez*, 468 F.2d 565 (2d Cir. 1972) *cert. denied*, 410 U.S. 945 (1973); *United States v. Gaines*, 460 F.2d 176 (2d Cir.) *cert. denied*, 409 U.S. 883 (1972); See *Anderson v. Maryland*, 427 U.S. 463, 469 n.4 (1976).

POINT IV

Conti Was Properly Convicted of Attempted Extortion Under Count Five.

In a remarkably disingenuous argument, Conti contends that his conviction under Count Five must be reversed because American Automated and its employee, Special Agent Wayne Orrell, as agents of the Government, could not be put in fear. Therefore, Conti continues, his conviction for the substantive crime of extortion was unsupported by the Government's proof.* The short answer to this argument is that Conti was not convicted of extortion but, rather, of *attempted* extortion.

The provision under which Conti was convicted, Title 18, United States Code, Section 1951, provides as follows:

- (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion *or attempts or conspires so to do*, or commits or threatens physical violence to any person

* This argument was never made in the Court below and is therefore waived for purposes of appellate review. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert denied*, 383 U.S. 907 (1960). Further as stated in Point III of this brief at page 34, Conti received concurrent sentences on Counts One through Five and therefore this Court need not consider this argument. (See cases cited above).

or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this Section——

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of *actual or threatened force, violence, or fear*, or under color of official right. (emphasis supplied).*

Thus the statute, by its very terms, proscribes not only interference with commerce by means of extortion, but any "attempt . . . so to do," and all that is required to sustain the present charge is proof of an attempt to instill fear. *Carbo v. United States*, 314 F.2d 718, 741 (9th Cir. 1963), *cert. denied*, 377 U.S. 1010 (1964). See also, *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975); *United States v. Jacobs*, 451 F.2d 530 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States v. Tropiano*, 418 F.2d 1069, 1082 (2d Cir. 1969); *United States v. Nadaline*, 471 F.2d 340, 343-44 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973). Count Five of the present indictment charged Conti with "attempted extortion," and it was this offense of which he was convicted by the District Court. (Tr. 3033).**

Further, Conti cites no statutory or decisional authority which stands for the proposition that an agent of the Government cannot be put in fear or that the

* We note that those portions which we have italicized are entirely omitted in Conti's quotation of the statute (Br. 32).

** Count Five charged in pertinent part, that the defendants "unlawfully, wilfully and knowingly did obstruct, delay and affect, and attempt to obstruct, delay and affect commerce and the movement of articles and commodities in commerce . . ." (App. 27).

Government cannot be the victim of an extortion. Indeed given the circumstances of this case, we submit that Special Agent Orrell, after having twice been struck by Conti, as well as threatened with death, was in *actual* fear for his life.* See, *United States v. Tolub*, 309 F.2d 286, 289 (2d Cir. 1962); *United States v. Sciolino*, 505 F.2d 586, 589 (2d Cir. 1974).

More important than the issue of whether a Government agent can be put in actual fear as the victim of an extortion, however, is a plain reading of the statute which defines the term extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual *or* threatened force, violence *or* fear . . . or under color of official right." (Emphasis supplied). On its face the statute condemns the wrongful use of five methods of obtaining property of another: (1) actual force; (2) threatened force; (3) violence; (4) fear; or (5) under color of official right. Surely Conti extorted American Automated through the use of actual and threatened force, not to mention violence. These methods therefore constituted separate grounds for his conviction and the question of whether a Federal Bureau of Investigation undercover agent who is the victim of an extortion can be in fear, need not be reached by this Court.

Finally, Conti's argument, in essence, is one of factual impossibility as opposed to legal impossibility. Legal im-

* Orrell testified that right after the second occasion upon which he was struck by Conti he felt himself losing consciousness from the blow:

"...I thought I was going out. At that time I was very scared because he had threatened to kill me and I thought he was going to carry it out." (Tr. 1348-49).

Orrell's fear of Conti was intensified by the observation of a bulge "about the size of a fist" which protruded from Conti's shirt (Tr. 1350-52).

possibility occurs when the actions which the defendant performs or sets in motion, even if fully carried out, would not constitute a crime, whereas factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective. *United States v. Oveido*, 525 F.2d 881, 883 (5th Cir. 1976); *United States v. Roman*, 356 F. Supp. 434 (S.D. N.Y. 1973). Virtually all courts are in agreement that the latter, factual impossibility, is no defense to a charge of attempt. *United States v. Roman*, *supra*, at 438; See, W. LaFave and A. Scott, *Handbook on Criminal Law*, 438-45 (2d ed. 1972).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

Barbara S. Jones being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 14th day of October, 1977
She served a copy of the within
by placing the same in a properly postpaid franked
envelope addressed:

Ray M. Cohn
Michael Rosen
SMYKE, BACON & BOLAN, P.C.
39 East 68th Street
New York, N.Y. 10021

And deponent further says that She sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Sworn to before me this

14th day of October, 1977

Elizabeth A. McKeevie

ELIZABETH A. McKEEVIE
Notary Public, State of New York
No. 43-4629152
Qualified in Richmond County
Commission Expires March 31, 1978

